IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1641 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M/S. SCAN COMPUTER CONSULTANCY - Petitioner(s)

Versus

UNION OF INDIA & 2 - Respondent(s)

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Appearance :
MR Dhaval Shah for Mr. PARESH M DAVE for Petitioner
MR JITENDRA MALKAN for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2 - 3.
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 24/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1.This petition challenges the communication dated 10/1/2006 (Annexure “E”) and dated 20/1/2006 (Annexure “G”) issued by the office of Commissioner of Central Excise (Appeals), Ahmedabad. Though, the petitioner has also challenged the Order in Appeal No.152/2005 (Ahd-I)CE/Comr(A-II) dated 16/8/2005 (Annexure “B”), for the reasons that follow hereinafter, it is not necessary to deal with the said prayer.

2.The controversy between the parties stands concluded by a decision of this Court in the case of Hussain Haji Harun alias Hussein Kabiju v. Union of India, AIR 1988 GUJARAT 218 and hence, it is not necessary to set out the facts and contentions in detail. For the same reason, the petition is taken up for final hearing and disposal today. Rule. Mr.Malkan is directed to waive service.

3.For the period from 22/1/1995 to 1/9/1995, by Order in Original dated 30/10/2000, the excise duty liability to the tune of Rs.3,90,363/- was fastened on the petitioner with equal amount of penalty on the petitioner firm coupled with personal penalties on the partners of the firm. The said order came to be challenged by way of appeal accompanied by an application seeking stay. It is the case of the petitioner that a copy of Order in Appeal was handed over personally by an officer of the Central Excise Department sometime in August 2005 at their new premises. That, after filing the appeal, the petitioner firm had moved and hence, possibly the order directing pre-deposit of an amount of Rs.1,70,000/- made on the stay application had not been served on the petitioner. However, the said amount was deposited on 26/12/2005 and on 27/12/2005, a restoration application seeking restoration of appeal was filed before the Commissioner (Appeals).

4.On 10/1/2006, the petitioner received a communication from the office of Commissioner (Appeals) stating that since the appeal had been finally disposed of vide order dated 3/16-8-2005, the appeal could not be restored at the level of Commissioner (Appeals) and the petitioner was advised to approach the higher judicial forum as per the preamble of the Order in Appeal. Thereupon, the petitioner wrote on 13/1/2006 to Commissioner (Appeals) again requesting for restoring the appeal for hearing the same on merits. In response to the said communication, on 20/1/2006, the office of Commissioner (Appeals) wrote to the petitioner reiterating the direction to file appeal before higher forum and also distinguishing the order dated 20/12/2004 made by Commissioner (Appeals) in case of another assessee, wherein appeal was restored, by drawing a distinction to the effect that, in the said case, an amount was

pre-deposited within ten days from the date of issue of the order dismissing the appeal, whereas in the present case, the petitioner had deposited the amount on 28/12/2005, which was after the lapse of the appeal period of 3 months for filing appeal to the higher appellate forum. That there is no legal basis for re-opening such a case.

5.Upon issuance of notice, respondents have put in appearance and filed affidavit in reply dated 21st February 2006. The same stand is reiterated in the affidavit in reply, namely, what has been stated in communication dated 20/1/2006. Mr.Malkan submitted that the Court must ensure that the amount of pre-deposit is made within a reasonable period from the date of dismissal of the appeal, even if such a course was permissible, because otherwise, according to him, the period of limitation for preferring an appeal to a higher forum would

lose its sanctity. It was also urged that any person may seek restoration within period of limitation prescribed for filing further appeal, as that could be termed to be a reasonable period within which compliance can be accepted.

6.In case of Hussain Haji Harun (supra), this Court was called upon to deal with almost a similar controversy, the only point of difference being the fact that, in the said case, the Tribunal had dismissed the appeal for want of compliance with the order of pre-deposit. The order of pre-deposit in the said case was made on 15/4/1985 granting the petitioner therein two months time to deposit the sum as directed. The appeal came to be dismissed on 20/12/1985. The petitioner preferred Miscellaneous Application NO.36 of 1986 seeking setting aside of the order of dismissal of the appeal and for restoring the

appeal to file. As the facts reveal, the petitioner therein had not even made deposit before approaching the Court and only after filing the petition, by way of a Miscellaneous Civil Application, a direction was sought to the effect that the Tribunal should accept the sum of pre-deposit and restore the appeal. Such a leave was granted on 19/12/1987. Therefore, it is apparent that more than a period of two years had elapsed since the order directing pre-deposit and also dismissal of the appeal.

7. In the aforesaid backdrop of facts, this Court, while dealing with the contention that the rules did not permit Tribunal to restore the appeal in a case where appeal was dismissed for default in relation to non-deposit of the amount as directed, laid down, “The mere absence of such a provision regarding the situation when an appeal comes to be dismissed

for non-deposit of the penalty amount or duty demanded cannot be construed on the basis that the Tribunal had no power to restore the appeal, which was dismissed for non-deposit of the penalty amount or duty demanded.”.

8.After referring to the Apex Court decision in case of Collector, Land Acquisition, Anantnag v. Ms. Katijui, (1987) 28 ELT 185, it was laid down, “when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred.”.

9.Repelling the contention that restoration of the appeal would amount to reviewing the earlier order of dismissal, it was laid down, “It is not possible to regard the order of dismissal on the ground that penalty amount was not deposited in time to be a final order. It is also, therefore, not possible to accept the

view that restoring such an appeal would amount to reviewing the earlier order of dismissal. The whole fallacy lies in the approach that if such an appeal was to be restored, it would amount to reviewing its earlier final order.”.

10.Applying the aforesaid ratio to the facts of the case, it is apparent that Commissioner (Appeals) committed an error in law when he came to the conclusion that he could not restore the appeal and the only remedy was by way of preferring appeal before higher forum. Needless to state that, by mere default in making deposit as directed, the appellant does not stand to gain anything and only delays his right to have his case adjudicated. Nor does such a delay in making pre-deposit cause any prejudice to the revenue, in absence of any stay operating in favour of the petitioner. It cannot be lost sight of that right of appeal is statutorily granted and it is hedged in by the

requirement to make pre-deposit as directed by the appellate authority, as being a condition for hearing of the appeal on merits. However, that condition cannot be used by the appellate authority for the purposes of denying an appellant the right of adjudication which is otherwise statutorily granted. In a given case, even if no pre-deposit is made, the appeal may not be heard, but having dismissed the appeal for non-compliance of pre-deposit does not permit the appellate authority to refuse to restore the appeal upon compliance being shown.

11.In these circumstances, the two communications dated 10/1/2006 (Annexure “E”) and dated 20/1/2006 (Annexure “G”) are hereby quashed and set aside. In the circumstances, the Commissioner (Appeals) is directed to hear and decide afresh the Miscellaneous Application for restoration of appeal in accordance with law

after giving reasonable opportunity of hearing to the petitioner.

12.Considering the fact that the entire litigation has emanated because of the fault of the petitioner in not intimating the change of address in appropriate time, it would be just and proper that the petitioner be visited with costs which are quantified at a sum of Rs.2,500=00 [Rupees two thousand five hundred only]. The same shall be deposited with the respondent department within a period of fortnight from today.

13.Rule made absolute.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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